RECENT CASES

ACTIONS—LIS PENDENS—PLEADING—Plaintiff obtained a decree of divorce in Kentucky, in which an adjudication of the right to alimony was expressly reserved. Subsequently, defendant removed to Georgia, and plaintiff then instituted a suit against him to obtain alimony. Later, judgment was entered in the Kentucky court on the divorce decree allowing alimony. Plaintiff then brought suit in Georgia on the Kentucky judgment, and defendant pleaded in abatement the pendency of the suit for alimony. *Held*, The plea in abatement is not good, as the respective causes of action are not the same. Underwood v. Underwood, 77 S. E. Rep. 46 (Ga., 1913).

It is a general principle of the law that the pendency of a prior suit for the same thing, or, as is commonly said, for the same cause of action, between the same parties, in a court of competent jurisdiction, will abate a later suit. Com. v. Churchill, 5 Mass. 174 (1809); Porter v. Kingsbury, 77 N. Y. 164 (1879); Brooke v. Phillips, 6 Phila. 392 (1867).

The court bases its decision in the principal case on two grounds: (1) that the causes of action are not the same as "one is for a definite liquidated sum and the other is for an uncertain amount, depending on the special circumstances of the case and the discretion of the court," and (2) that the same evidence will not support both causes of action.

In accord, on closely analagous facts to the principal case are Steers v. Shaw, 53 N. J. L. 358 (1891); Rogers v. Adell, 39 N. H. 417 (1859); *contra* Westivelt v. Jones, 7 Kan. App. 70 (1898).

The second ground for the decision in the principal case, that the criterion by which to decide whether two suits are for the same cause of action is whether the evidence properly admissible in the one will support the other, is stated in Steers v. Shaw, *supra;* Steam Packet Co. v. Bradley, 5 Cranch C. C., 393 (U. S., 1838).

The distinction between *lis pendens* and *res judicata* is that the one is interposed because of the pendency of the first action, the other after its termination; the one is in abatement of the second suit, the other in bar to defeat it absolutely. Foster v. Napier, 73 Ala. 595 (1883).

BANKS—CHECKS—PAYMENT ON FORGED INDORSEMENT OF PAYEE—Where the plaintiff, discounting a note made by S. to M. and B., indorsed in blank in the name of M. and B. and presented by V., gave to V. a check payable to M. and B., intending to deal only with M. and B., and the bank paid it on its indorsement in the name of M. and B., forged by S., as had been the indorsement of the note, it was *held* that it could not charge the payment to the plaintiff, even if he was negligent in delivering the check to V.; the circumstances not clearly charging him with knowledge that V. was an impostor. Kobre v. Corn Exchange Bank, 139 N. Y. Suppl. 890 (1913).

This is in accord with the general rule that a bank which pays a check on a forged indorsement acquires no right against the drawer, and cannot charge to his account the amount so paid out. Robarts v. Tucker, 16 Q. B. 560 (1851); Belknap v. Bank, 100 Mass. 376 (1868); Washington First Nat. Bank v. Whitman, 94 U. S. 343 (1876); Hattoy v. Holmes, 97 Cal. 208 (1893); Critten v. Chem. Nat. Bank, 171 N. Y. 219 (1902).

While the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alterations, it is not the law that he is bound to so prepare the check that nobody else can successfully tamper with it. Société Générale v. Metropolitan Bank, 27 L. T. (N. S.) 849 (1873); Belknap v. Nat. Bank, *supra.*

If a bank pays a check on a forged indorsement, it is no defense against a recovery by the rightful owner. Buckley v. Jersey City Bank, 35 N. J. L. 400

(1872); Bobbett v. Pinkett, 1 Ex. D. 368 (1876); Welsh v. German American Bank, 73 N. Y. 424 (1878); Farmer v. Nashville Fourth Nat. Bank, 100 Tenn. 187 (1897). Moreover, an indorsement by a person bearing the same name as the payee, but not the real person, is a forgery, and payment to him will not excuse the bank from paying the true owner of the paper. Graver v. Amer. Exch. Bank, 17 N. Y. 205 (1858); Ind. Nat. Bank v. Holtsclaw, 98 Ind. 85 (1884).

When a check is issued or indorsed to an impostor, there is a conflict of opinion as to who must bear the loss. The weight of authority seems to be that the drawer of the check must bear the loss. Meyer v. Ind. Nat. Bank, 27 Ind. App. 354 (1901); Cent. Nat. Bank v. Nat. Metropolitan Bank, 31 App. D. C. 391 (1908).

BILLS AND NOTES—INTEREST—WHEN DOES IT START TO RUN ON DEMAND PAPER—A note made payable "one day after date . . . . without interest," properly construed, with regard to the evident intent of the parties, will begin to bear interest only from the time payment is demanded or suit is brought thereon. It is substantially analogous to a demand note, and the general rule is that interest on a debt payable on demand runs only from the time of making the demand. Pierpoint v. Pierpoint, 76 S. E. Rep. 848 (W. Va., 1912).

This accords with the weight of authority. Horn v. Hansen, 56 Minn. 43 (1893); Culvin v. Marks, 122 Ind. 554 (1890); Huut v. Nevers, 15 Pick. 500 (Mass., 1833); Scudder v. Morris, 3 N. J. L. 419 (1818); *Re* Herefordshire Banking Co., L. R. 4 Eq. 250 (1867); Rayne v. Guthrie, Add. 137 (Pa., 1793); Breyfogle v. Buckley, 16 S. & R. 264 (Pa., 1827); Trust Co. v. Kennedy, 175 Pa. 160 (1896). The minority rule, *contra*, is that upon such notes interest begins to run from the day certain upon which the principal sum is due. Curtis v. Smith, 75 Conn. 429 (1902); Darling Wooster, 9 Ohio 517 (1859); McMullen v. Rafferty, 89 N. Y. 456 (1882). The court, in the principal case, flatly refused to follow the latter rule, saying that it would be an absurdity to apply it to an instrument in which the "day certain" was the day next following that of making, and in which there was the express stipulation "without interest"—a stipulation certainly intended to have a practical meaning.

The rule is the more consistent when applied to notes carrying no stipulation as to interest, where the rule is that presentation or demand must be made at maturity in order to start interest running from that time. Cain v. Morris, 15 La. 494 (1840); Scovil v. Scovil, 45 Barb. 517 (N. Y., 1865); Evans v. Sanders, 8 Port. 497 (Ala., 1839); Rayne v. Guthrie, *supra*.

BILLS AND NOTES—RIGHTS ON INDORSEMENT—HOLDER IN DUE COURSE—N. I. L.—The decision in McCarty v. Kepreta, 139 N. W. Rep. 992 (N. D., 1913), is an interpretation of §§ 6354 and 6358, Rev. C. of N. D., of Negotiable Instruments Law, (§§ 52, 56, Pa.), providing that a holder in due course is a holder who has taken the instrument under the following conditions, *inter alia* (4), that at the time it was negotiated to him he had no notice of the infirmity in the instrument or defect of title of the person negotiating it; and to constitute notice . . . . (the holder) must have actual knowledge of such facts that his action in taking the instrument amounted to bad faith. The action was replevin to secure goods (for foreclosure purposes) covered by a mortgage given as security for a note; the defense was that the note was given as accomodation to a state bank, that it was under a local statute illegal by reason of excess and that plaintiff, president of the bank, could not be a holder for value under the Act, even though he paid value for it upon the assurance of the cashier that it was good. *Held:* The Act must necessarily be construed with, and as supplemented by, statutory provisions or general laws regulating the relationship of the parties. Here the cashier was managing officer and the plaintiff president was a member of the board of directors *ex officio*, and the bank through its cashier is affected with notice of all the defenses. Any notice a director has, or ought to have officially, he has or will be conclusively presumed at law to have as an individual. The plaintiff is not under the Act as quoted a holder for value.

The question involved arises here for the first time under the N. I. L. Decisions before the Act, in accord are Morris v. Loan Co., 109 Ga. 12 (1899);

Shedden v. Heard, 110 Ga. 461 (1910); Pond v. Waterloo Co., 50 Ia. 596 (1879). *Contra*, King v. Doane, 139 U. S. 166 (1890). See Brannan on Negotiable Instrument Law, §§ 52, 56.

CONTRACTS — ILLEGALITY — AUCTION SALES — B, a bidder at public sale, promised A, another bidder, to sell A the goods for which he was bidding at a certain price, if A would withdraw from the bidding. A withdrew, but was later unable to raise the required amount. B then promised A to hold the offer open for a certain time if A would raise a less amount. A, after much trouble, raised the amount within the time; but B refused to sell him the goods. In an action by A v. B, it was *held* that the first agreement was illegal being *contra bonos mores* and that the subsequent agreement was independent of it and valid. Owens v. Wright, 76 S. E. Rep. 735 (N. C., 1912).

The decision is in accord with the general rule. The rule is that the enforcement of an agreement by which bidding at a public sale is suppressed is *contra bonos mores;* and the law will not assist either party to such an agreement. Ingrain v. Ingrain, 49 N. C. 189 (1846).

If the original transaction is illegal and a new promise is made, which is dependent upon, and connected with, the illegal act, there is no basis for recovery, no matter how many times and in how many different forms the new promise may be made; for repeating a void promise will not give it validity. Seidenbender v. Charles, 4 S. & R. 151 (Pa., 1818). Accordingly, every new agreement in furtherance of, or for the purpose of carrying into effect, any of the unexecuted provisions of a previous illegal agreement is void. Brown v. Kennedy, 12 Colo. 235 (1888).

Where, on the other hand, the new contract is formed on a *new* consideration, and has no direct connection with the illegal transaction, but is collateral to it, including no right or claim belonging to it, the new contract is valid and enforceable. De Witt v. Brisbane, 16 N. Y. 508 (1858); Swan v. Scott, 11 S. & R. 155 (Pa., 1824).

The question, in cases similar to the principal case, is, therefore: can the plaintiff establish his case otherwise than through the medium of an illegal transaction, to which he was himself a party?

DAMAGES—MEASURE—LOSS OF SOCIETY OF SON TO PARENTS—An action was brought by the parents for death of a son, who was of age, under the Federal Employer's Liability Act; it was *held*, in American R. Co. v. Didricksen, 33 U. S. Sup. Ct. 224 (1912), that the damages should be restricted to the actual financial injury sustained by the parents and that no allowance should be made for loss of society or companionship, or for any care or consideration the son might have manifested towards them during their declining years.

The right of action for loss of life is of purely statutory creation and, therefore in order to ascertain what damages are recoverable the various statutes must be resorted to. Ordinarily the rule is that recovery shall be limited to financial damages whether the action is for the benefit of wife, husband, parents or children. Blake v. Midland Ry. Co., 18 Q. B. 93 (1852); Lett v. St. Lawrence Ry. Co., 11 Can. App. 1 (1884); Michigan R. R. v. Vreeland, 33 Sup. Ct. 122 (U. S., 1912). But the damages are not confined to present and immediate pecuniary losses, but may include prospective losses. Carter v. West Jersey R. R., 76 N. J. L. 602 (1908). In several jurisdictions, however, damages not strictly pecuniary are recoverable, particularly where minor children are the claimants. Tilley v. Hudson River R. R., 29 N. Y. 252 (1864); McIntire v. N. Y. C. R. R., 37 N. Y. 287 (1867); Countryman v. Fonda R. R., 166 N. Y. 201 (1901); Webb v. D. R. G. R. R., 7 Utah, 17 (1890); Green v. So. Cal. R. R., 132 Cal. 254 (1901). In at least two jurisdictions recovery is allowed for mental anguish as well as loss of society. Matthews v. Wainer, 29 Grat. 570 (Va., 1877); C. & O. R. R. v. Ghee, 110 Va. 526 (1910); Cleary v. City R. R., 76 Cal. 240 (1888).

Where a parent sues for the loss of a child, the recovery is limited to pecuniary injuries. Paulmier v. Erie R. R., 38 N. J. L. 151 (1870); Diebold v. Sharp, 19 Ind. App. 474 (1898); Pressman v. Mooney, 5 App. Div. 121 (N. Y., 1896); Pa. R. R. v. Keller, 67 Pa. 300 (1871); Sutherland on Damages, § 1273. No allowance is to be made for loss of society. Wales v. Pac. Co., 130 Cal. 521

(1900); Pupper v. So. Pac. Co., 105 Cal. 389 (1896). The pecuniary injury need not be exactly proved on trial, and even where the child was a mere infant when killed, the court will not be justified in granting a non-suit or directing nominal damages. Ihl v. Forty-Second Street R. Co., 47 N. Y. 321 (1867); but see So. Pac. R. R. v. Cavenia, 100 Ga. 46 (1886). The possibility of future support may be considered by the jury in assessing the damages, 90 Pa. 1 (1879); Erven v. Chicago, etc., R. R., 38 Wisc. 613 (1875). When the child was a minor his disposition and ability to support his parents after reaching his majority was considered too vague in Esker v. Mineral R. R. Co., 28 Sup. Ct. 393 (Pa., 1905); *contra*, Thompson v. Johnson, 86 Wis. 576 (1893).

EVIDENCE—EXPERTS—MEDICAL BOOKS—In Denver City Tr. Co. v. Gawley, 129 Pac. 258 (Col., 1912), it was held that medical books are not admissible in evidence, and that where a physician confined his testimony to his experience, cross-examination as to whether he agreed with writings of a medical author was improper unles he first testified that he read the author and regarded his work as of sufficient merit on which to base his opinion.

This is in accord with the general rule that medical authorities may not be used to contradict an expert generally. Macfarland's Trial, 8 Abb. Pr. (N. S.) 57 (N. Y., 1870); Davis v. State, 38 Md. 15 (1873); Knoll v. State, 55 Wis. 249 (1882); Marshall v. Brown, 50 Mich. 148 (1883). There are cases to the contrary, however; Hutchinson v. State, 19 Neb. 262 (1886); State v. Winter, 72 Iowa, 627 (1887); Thompkins v. West, 56 Conn. 478 (1888); Hess v. Lowrey, 122 Ind. 225 (1890); Fisher v. R. Co., 89 Cal. 399 (1891).

Where a physician bases his opinion upon certian medical works, the authorities may be used to contradict and discredit him. State v. Wood, 53 N. H. 484 (1873); Huffman v. Cluck, 77 N. C. 55 (1877); City of Bloomington v. Shrock, 110 Ill. 219 (1884).

Many authorities hold that medical books are not competent evidence. People v. Wheeler, 60 Cal. 581 (1882); People v. Hall, 48 Mich. 482 (1882); Com. v. Marzynski, 149 Mass. 68 (1889); U. P. R. Co. v. Yates, 79 Fed. 584 (1898); Bixby v. Omaha & C. B. R. & B. Co., 105 Iowa, 293 (1898). Nor do medical works come within a statute admitting as evidence "books of science" to prove "facts of general notoriety or interest." Gallagher v. Market St. R. Co., 67 Cal. 13 (1885); Bixby v. Omaha Co., *supra;* U. P. R. Co. v. Yates, *supra*. Other authorities hold that medical authorities admitted or proved to be standard works with the profession may be used in evidence. State v. Winter, *supra;* Birmingham, etc., Co. v. Moore, 148 Ala. 115 (1906).

Outside of the states of Iowa and Alabama, there seem to be no well-considered cases upholding the admission of medical books in cases like our principal one. In those states technical and obscure phrases should be explained by experts. Stoudenmier v. Williamson, 29 Ala. 558 (1857).

INFANTS—NECESSARIES—SERVICE OF ATTORNEY—A suit was brought in the name of an infant, by the direction of her next friend, to protect the infant's title to real estate. *Held*, that the counsel could not recover against the infant for services in such suit as they are not regarded as necessaries, and may be avoided by the infant, even under an express promise. Grissoun v. Beidleman, 129 Pac. Rep. 853 (Okla., 1913).

It is generally a question of fact in each case to determine what are "necessaries." Lord Coke considers necessaries of an infant to include "victuals, clothing, medical aid, good teaching and instruction whereby he may profit himself afterwards," Co. Litt. 172 a. Parsons on Contracts, p. 246, added "counsel fees and expenses of a law suit," but in Thrall v. Wright, 38 Vt. 494 (1866), the court said this could not be taken as a general rule, but the circumstances of each case must govern.

The general rule was stated in McIsaac v. Adams, 190 Mass. 117, 1906. "We can conceive of conditions such that a minor may be bound to pay reasonable compensation for the services of an attorney, on the ground that they were necessary; but ordinarily this liability is limited to cases where the services are rendered in connection with the minor's personal relief, protection, or liberty," and refused to extend it to a case where services were rendered regarding land. *Accord*, Phelps v. Worcester, 11 N. H. 51 (1840); Englebert v. Troxell, 40 Neb.

195 (1894); Dillon v. Bowles, 77 Mo. 603 (1883), although infant was greatly benefited by result. In Thrall v. Wright, *supra*, the suit was regarding a note. But in Scarcy v. Hunter, 81 Tex. 648 (1891), the court said "Looking to the condition of affairs in our own state, it seems to us that to refuse to allow an attorney, who at the instance of the next friend has instituted a suit in behalf of the minor and recovered for him money or *property*, to claim from the infant a reasonable compensation for his services would be to establish a rule which would operate to the prejudice of the class it is designed to protect." And where there is no guardian, the infant's estate is liable for its fees of counsel whose services contributed to secure it. Epperson v. Nuggent, 57 Miss. 45 (1879). And, of course, when Chancery directs the guardian *ad litem* to employ counsel, the Chancellor will set aside a reasonable fee for the counsel. Colgate v. Colgate, 23 N. J. 372 (1873).

In the follgwing cases the services of counsel were held to be necessaries, hence the infant could not avoid the liability. Crafts v. Carr, 29 R. I. 397 (1902); prosecution of an action for indecent assault. Helps v. Clayton, 17 C. B. [N. S.] 553 (Eng., 1866), services for drawing up a settlement. Sutton v. Heinze, 84 Kan. 756 (1911), suit for personal injuries. Munson v. Washband, 31 Conn. 303 (1863), damages for breach of promise. Barker v. Hibbard, 54 N. H. 539 (1874), defending a minor in a bastardy proceeding.

The principal case is very valuable for the complete collection of authorities.

INFANTS—RIGHT OF ACTION—INJURY TO UNBORN CHILD—An unborn child is not in existence so as to be entitled to the protection of his person as well as his property, and may not recover damages for a deformity due to the negligence of a railroad company in transporting its mother, then pregnant. Nugent v. Brooklyn Heights R. Co., 139 N. Y. Sup. 367 (1913).

The case is in accord with the authorities, which are three. Walker v. Great Northern R. Co., 28 Irish L. R., Q. B. & Ex. Div. 69 (1891); Dietrich v. Northampton, 138 Mass. 14 (1884); Allaire v. St. Luke's Hospital, 184 Ill. 359 (1900). These cases recognize that if a child is born alive and afterwards dies of injuries received while *in utero* it is murder or manslaughter. 4 Bl. Com. 198; Rex v. Senior, 1 Moody C. C. 346; Regina v. West, 2 C. & K. 784 (1848). And is *in esse* as far as the usual rights of property are concerned. It may take as heir or devisee. Botsford v. O'Conner, 57 Ill. 72 (1870); Morrow v. Scott, 79 Ga. 535 (1849); Bowen v. Hoxie, 137 Mass. 527 (1884); Anbuchon v. Bender, 44 Mo. 560 (1869); Marsellis v. Thalhiemer, 2 Paige 35 (N. Y., 1830); Laird's Ap. 85 Pa. 339 (1877). And may maintain an action for the death of its father for culpable negligence. Quinlen v. Welch, 69 Hun. 584 (1893); R. R. v. Robertson, 82 Tex. 657 (1891); Herndon v. R. R. 128 Pac. Rep. 727 (Okl., 1912). A guardian may be appointed for it. Marseilles v. Thalhiemer, *supra*. It may have an injunction to stay waste and be appointed an executor. Quinlen v. Welsh, *supra;* 1 Wms. Exrs. *232, 6th Am. Ed. Admitting this much, it is difficult to see why it should not be treated as *in esse* for all purposes, and why a distinction is drawn in this class of cases, especially since it has been held that the mother could not recover for injuries so inflicted to her child. Dulieu v. White, 2 K. B. 669 (1901).

JUDGMENTS—INDEX—NAME OF DEBTOR—Several persons living in the same locality as the judgment debtor had the same Christian and surname. The judgment did not properly set forth the debtor's correct middle initial and was so rendered. *Held:* that such judgment was ineffectual against a subsequent mortgagee without actual notice. Lature v. Little, 60 So. Rep. 474 (Ala., 1912).

"The common law rule of but one Christian name and one surname, and that a wrong middle initial or name is immaterial will certainly not answer the modern requirements of business with reference to recorded conveyances being notice to the world." Bank v. Hacoda Mercantile Co., 169 Ala. 476 (1910). In *accord* with the principal case are: Dutton v. Simions, 65 Me. 583 (1876), judgment against Henry "M." Hawkins is not binding on the estate of Henry "F." Hawkins. Davis v. Steeps, 87 Wis. 472 (1894), docket entry against "Edward Davis," no lien on estate of "E. A. Davis" or "Edward A. Davis." Crouse v. Murphy, 140 Pa. 335 (1891), judgment entry of "Daniel Murphy" is not constructive

notice of lien against estate of "Daniel J. Murphy." Delancy v. Becker, 14 Sup. 392 (1900), judgment against "George A. Baker" is not notice of lien against "George A. Becker." Bernstein v. Schoenfield, 16 N. Y. S. 140 (1902); Stone v. Threefoot Bros., 54 So. Rep. 595 (Miss., 1911).

A mortgage defectively recorded and indexed by erroneously changing the first initial of the name of the mortgagor, is not binding upon subsequent purchasers without actual notice, Prouty v. Marshall, 225 Pa. 570 (1909. But in Johnson v. Day, 2 N. D. 295 (1891), a mistake in the middle initial of the mortgagor's name, in foreclosure proceedings, was immaterial as the law recognizes but one Christian name. And in Fincher v. Hanegan, 59 Ark. 151 (1894), a mortgage executed by Henry "M." Ward, by the name of Henry "N." Ward, gave constructive notice, where it did not appear that there was more than one Henry Ward in the county.

As to misnomer in service of process, see Illinois R. R. v. Hausenwinkle, 15 L. R. A. (N. S.) 129 and notes (Ill., 1908); Butler v. Smith, 28 L. R. A. (N. S.) 436 (Neb., 1909).

MUNICIPAL CORPORATIONS—POWERS—TORTS—A municipal corporation divided a tract of common land within its limits into building lots, and leased the same for summer cottages. The tract was not required for public purposes. A strip of land bounding the tract was reserved by the town and intended by it as a common passageway to the leased lots. While lawfully on this reserved strip the plaintiff was injured through the negligence of the defendant town and under circumstances giving her a right to go to the jury had the defendant been a private corporation or a natural person. The defense was that the acts of the defendant upon which the plaintiff relied were *ultra vires*, nad therefore that it was not answerable. *Held*, that the plaintiff might recover. Davis v. Rockport, 100 N. E. Rep. 612 (Mass., 1913).

It has been repeatedly held that a municipal corporation may deal with its property as a private individual for its own benefit when and at such times as the property is not required for the public use for which it was designed. The question has usually arisen on the leasing of public buildings for entertainments, shops, *etc.* Camden v. Village, 77 Me. 530 (1886); Worden v. New Bedford, 131 Mass. 23 (1882); Bell v. Plattuille, 71 Wis. 142 (1888); Bates v. Bassett, 60 Vt. 530 (1895); Spaulding v. Lowell, 23 Pick. 71 (Mass., 1851); French v. Quincy, 3 All. 9 (Mass., 1862); Oliver v. Worcester, 102 Mass. 489 (1871), in which the court said that a municipality may hold or deal with its property "not for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same manner that a private individual might." While such uses, by the weight of authority, would be *ultra vires* if foreign to the primary objects of the corporation, yet they are valid when incidental to a legitimate primary object, being in fact essential to economy and the best management of the corporate property.

Under the Massachusetts doctrine, which is followed throughout New England, a town is not liable for injuries caused by a defect or want of repair in public property used solely for a public use, such duties being imposed on all towns by a general act. Mower v. Leicester, 9 Mass. 247 (1812); Hill v. Boston, 122 Mass. 344 (1877). This doctrine follows the English view as expressed in Russell v. Devon Co., 2 D. & E. T. R. 667 (1788), and seems to be more restricted than the general American doctrine. Pray v. Jersey City, 32 N. J. L. 108 (1840); Larkin v. Saginaw Co., 11 Mich. 88 (1861); Calvert Co. v. Gibson, 36 Md. 229 (1872); Hedges v. Madison, 6 Ill. 567 (1846). However, under either rule it seems to be well settled that when the corporation receives a consideration or legitimately leases its public property to private persons for a private use, it stands in the same relation to such persons as would a private corporation or a natural person, and is therefore liable to them, as in the principal case, for injuries caused by a failure to keep the leased premises in proper repair. Worden v. New Bedford, 131 Mass. 23 (1882); Mackey v. Vicksburg, 64 Miss. 777 (1887); Carrington v. St. Louis, 89 Mo. 208 (1901); Rowland v. Kalamazoo, 49 Mich. 553 (1882); Suffolk v. Parker, 79 Va. 660 (1885); Savannah v. Cullens, 38 Ga. 334 (1884); Guthrie v. Philadelphia, 73 Fed. 688 (1896).

NEGLIGENCE—DEATH OF INJURED PARTY—SURVIVAL OF ACTION—In Crider v. Moorhead, 51 Pa. Super. Ct. 532 (1912), an action for damages was begun by plaintiff's decedent for injuries sustained through defendant's negligence; but before trial death intervened—whether from the injury in question or from other causes does not appear—and his personal representatives were substituted, under § 18 of Act of 1851, P. L. 669, which provides that "no action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiffs . . . . . ." The defense contended that this section was limited by the succeeding section (§ 19) which provides "that whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, ... or personal representatives, may maintain an action . . . . . ." *Held:* The cause of action, having accrued to the decedent in his lifetime, would under § 18 survive to his personal representatives. This section creates only survivorship of an existing cause of action. Nor is it limited by § 19, so that it need appear that the death is the result of the injury complained of.

The eighteenth section provides for survival of an existing cause of action. R. R. v. Zebe, 33 Pa. 318 (1858); Hill v. R. R. 178 Pa. 223 (1910); while section nineteen creates a new cause of action wholly unknown to the common law, in that it provides recovery where death might be the immediate and direct consequence of the negligent act, in which case no right of recovery ever vested in the injured party, nor any other person at common law. McCafferty v. R. R., 193 Pa. 339 (1899); R. R. v. Henderson, 51 Pa. 315 (1865); Penna. R. R. v. McCloskey, 23 Pa. 526, 530 (1854); Fink v. Garmen, 40 Pa. 103 (1861); Birch v. Ry., 165 Pa. 339 (1895).

NEGLIGENCE—INJURIES TO CHILDREN—The defendant caused one of its wagons to be driven through a city street at a walk, from which its servants discharged advertising whirligig toys, or aeroplanes. The plaintiff, a boy of ten, followed the wagon with other children to get the toys when they fell to the ground. One of the toys falling under the wagon, the plaintiff reached between the wheels for it, but before he could withdraw, the back wheels of the wagon passed over his arm, crushing it. *Held*, that the plaintiff was not entitled to recover under the turntable doctrine and in absence of proof of actionable negligence the defendant is not liable. Hight v. American Bakery Co., 151 S. W. Rep. 776 (Mo., 1912).

The plaintiff based his complaint and tried the case solely upon the "turntable" theory. That court laid down the rule which was expressed in Bottum Adm. v. Hawk, 84 Vt. 370 (1911), "that the rule (turntable) is to be invoked not as a foundation for the liability of the defendant, but to meet the defense of contributory negligence on the part of the plaintiff, a child, injured. It is applied not as a weapon of attack or a ground for liability, but as a defense."

The germ of the "turntable" doctrine was expressed in Lynch v. Nurdin, 1 A. & E. (N. S.) 442, (Eng., 1840) and applied in R. R. v. Stout, 17 Wall. 657 (U. S., 1873) and Cooke v. Midland Ry., L. R. App. Cases, 229 (1909). For citations, see Bohlen's "Cases on Torts," 223.

The turning point of the case was whether the wagon was such an "attractive nuisance" as to cast upon the defendant the affirmative obligation to guard against such acts of the plaintiff. The court held that it was not. In Conlin v. Saunders, 58 Ill. App. 261 (1895), nothing so dangerous about an ice wagon to cast upon owner additional duty; *accord*, Walsh v. Hays, 72 Conn. 397 (1889); Lowry v. N. Y. Ice Co., 55 N. Y. S. 707 (1899). Nor a skeleton wagon for conveying stone, Foster Herbert Cut Stone Co. v. Pugh, 115 Tenn. 688 (1906). Traction Engine, Case Threshing Machine Co. v. Burns, 38 Tex. Civ. App. 412 (1905). Coal Wagon, Scott v. Peabody, 153 Ill. App. 103 (1910). Cable, drum and boomer, Fitzgerald v. Rodgers, 58 N. Y. App. Div. 299 (1901).

But the following have been held to be such attractive nuisances as to impose the additional duty and relieve the plaintiff from defense of contributory negligence. Iron carelessly piled in wagon which was allowed to stand on street, Lane v. Atlantic Works, 107 Mass. 104 (1871) and Bohlen's "Cases on Torts,"

112 for citations. Wagon attached to a moving house, Skinner v. Knickrehm, 10 Col. App. 596 (1909). Horseroller left on street, Westerfield v. Lewis, 43 La. Ann. 63 (1891). Street scraper, Kelley v. Parker, Washington Co., 107 Mo. App. 490 (1904). Wagon containing explosives, Lamsoni v. Saginaw City Gas Co., 148 Mich. 27 (1907), by a divided court.

For a full discussion of "attractive nuisance," see Cahill v. Stone Co., 153 Cal. 571 (1908); 19 L. R. Co. (N. S.) 1944 and notes.

NUISANCE—CONTINUING INJURY—DAMAGES—Where the builders of a railroad wrongfully blasted rock into a river so as to divert its channel and in times of high water cause a riparian owner's land to be overflowed, a release in full by that owner's grantor given at the time of creating the obstruction will not bar action by the new owner; not being created under any semblance of right, unlawful and wrongful from the outset, so long as any recurring injury results, actions may be maintained by the then owner. Turner v. Brooks & Sons, 151 S. W. Rep. 948 (Ky., 1912).

This accords with the universal rule that the continuance and every use of that which is, in its erection, a nuisance is a new nuisance. Staple v. Spring, 10 Mass. 72 (1813); Jones v. Deberry, 2 N. C. 248 (1795); Beckwith v. Griswold, 29 Barb. 291 (N. Y., 1859); Russell v. Brown, 63 Me. 203 (1874); Sanitary Dist. v. Ray, 199 Ill. 63 (1902). Failure to abate the nuisance after first recovery had aggravates the injury and enlarges the damages recoverable in a second action for continuance. Ganster v. Electric Co., 214 Pa. 628 (1906); Mulligan v. Augusta, 115 Ga. 337 (1902); Bowers v. Boom Co., 78 Minn. 398 (1899).

The theory of the law is that the infliction of damages in the first action will cause the abatement of the temporary nuisance, and if it does not, successive actions are maintainable, in which damages, compensatory and exemplary, may be awarded until discontinued. Ry. Co. v. Pattison, 67 Ill. App. 351 (1890); Brakken v. R. R. 32 Minn. 425 (1884); McKee v. R. R. 49 Mo. App. 174 (1892).

PARENT AND CHILD—RIGHT OF FATHER TO REASONABLE ACCESS TO BASTARD CHILD—Baker v. Baker, 85 Atl. Rep. 816 (N. J., 1913) held that such right in the father would be recognized in a court of equity.

At common law the father had the paramount right to the custody of his legitimate minor children, this right springing naturally from his duty to maintain, protect and educate them. The right, however, can hardly be said to have ever been absolute, but several English law cases permitted the father to obtain custody of his child under circumstances injurious to the child. Rex v. DeManneville, 5 East 221 (1804), infant, eight months old, taken from mother; Rex v. Greenhill, 4 Adol. & E. 624 (1836), father was living in adultery. These cases resulted in the passage of Lord Talfourd's Act (1839) and the Infants' Custody Act (1873), enlarging the powers of chancery courts and emphasizing the importance of making such orders, in respect to custody, as will best further the well being of the child, even though the strict legal right of the father might be disregarded. That is practically the attitude that the American courts have always taken. U. S. v. Green, 3 Mason 482 (1824); Mercein v. People, 25 Wend. 64 (N. Y., 1840); Kelsey v. Green, 69 Conn. 291 (1897); Hussey v. Whiting, 145 Ind. 580 (1896); Richards v. Collins, 45 N. J. Eq. 283 (1889). It is well established that either parent has the right of reasonable access to the children in the custody of the other parent.

As to illegitimate children, the rule is that the mother is the natural guardian of her bastard child, and, as such, has a legal right to its custody superior to the right of the putative father or any other person. Reg. v. Nash, 10 Q. B. Div. 454 (1883); Lipsey v. Battle, 80 Ark. 287 (1906); Ramsay v. Thompson, 71 Md. 315 (1889); Hesselman v. Haas, 71 N. J. Eq. 689, 694 (1906) contains a *dictum* by Garrison, V. C., to the effect that the mother's right is inferior to the putative father's. The mother will be deprived of the custody of her bastard child if her manner of living and habits render such action necessary in order to promote the well-being of the child. *In re* Hope, 79 R. I. 486 (1896); Fullilove v. Banks, 62 Miss. 11 (1884). The father's right to such child is inferior only to that of the mother, hence, after her death, he has first claim to the child. Aycock v. Hampton, 84 Miss. 204 (1904); Pote's Appeal, 106 Pa. 574 (1884).

At common law, it was the mother who was under the duty of supporting the child, but in nearly all jurisdictions statutes permit bastardy proceedings to be brought against the father to compel him to contribute to the maintenance of the child. Simmons v. Bull, 21 Ala. 501 (1852); Wright v. Wright, 2 Mass. 109 (1806). Now that the father must support the child, it is logical that the law should permit the father the privilege of at least visiting the child to see that the money supplied by him has been wisely and properly expended in the maintenance and education of the child even though it may still refuse to him the custody of the child, as long as the mother is living. This is the conclusion reached by the principal case which presented a question of first impression.

PLEADING—COMPLAINT—SEPARATE CAUSES OF ACTION—Plaintiff's allegations in his complaint were that his realty was injured in the construction by defendant subway company of additional stairways in front of his premises, so as to injure his property, and that defendant by the permanent erection and maintenance of such stairways had injured his property. *Held*, Under the Code, section 483, "Where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered." There are two distinct legal wrongs alleged, one based on the temporary obstructions and the other in maintaining permanent obstructions; they must be separately stated and numbered. Stines v. New York, 138 N. Y. Suppl. 962 (1912).

"All of the codes require that the different causes of action should be separately stated . . . . At the common law, these separate divisions of the declaration were termed 'counts.'" Pomeroy "Code Remedies" (4th edition), sec. 442.

The test to determine whether the plaintiff has alleged different causes of action is stated in the principal case as being, if the facts alleged show one primary right of the plaintiff and one wrong done by the defendant, involving that right, the plaintiff has but a single cause of action. But if the facts alleged in the pleading show that plaintiff is possessed of two or more distinct and separate primary rights, each of which has been invaded, or that the defendant has committed two or more distinct separate wrongs, the plaintiff has two or more causes of action. Pomeroy sec. 256; Knowles v. Cavanaugh, 144 Mich. 260 (1906); Banks v. Galbraith, 149 Mo. 529 (1899); Kruger v. Lumber Co., 11 Idaho 504 (1905).

Separately numbering the paragraphs in a pleading intended to set up only a single cause of action or defense does not vitiate the pleading, if but a single cause of action or defense is in fact pleaded. Waite v. Sabel, 62 N. Y. Suppl. 419 (1899); Winter v. Gose, 13 Wyo. 178 (1904).

An action for damages at common law for negligence cannot be joined in the same count with one for statutory negligence. McHugh v. Transit Co., 190 Mo. 85 (1905); nor can an action for malicious prosecution and one for false imprisonment be contained in a single court. Ring v. Mitchell, 92 N. Y. Suppl. 749 (1904).

POST OFFICE—USE OF THE MAILS TO DEFRAUD—ELEMENTS OF THE OFFENSE—"SCHEME TO DEFRAUD"—In Harrison v. U. S., 200 Fed. 662 (1912), a manufacturer was indicted under § 5480 (U. S. Comp. St., 1901, p. 3696) which makes penal the use of the mails in the furtherance of "any scheme or artifice to defraud," the offense alleged being the mailing of certain highly laudatory, though somewhat exaggerated circulars of advertising, and it was held that it is by decisions settled, not as an all-inclusive definition, that the statutory "scheme to defraud," may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange, and this deception may be by implication as well as by express words. On the other hand the "scheme" cannot be found in any mere expression of honest opinion as to the quality, or as to future performance, and the not uncommon cases of exaggerated or puffed advertising do not fall within this statute. *Accord*, U. S. v. Staples, 45 Fed. 195 (1891); Falkner v. U. S., 157 Fed. 840 (1907); Brown v. U. S., 146 Fed. 219 (1906); Rudd v. U. S., 173 Fed. 912 (1909); U. S. v. Steever, 222 U. S. 167 (1911).

The scheme or artifice need not be unlawful in itself, or constitute a fraud, either at common law or by statute. U. S. v. Loring, 91 Fed. 881 (1884). It is sufficient if its purpose is to defraud, and the mails are used, U. S. v. Wooten, 29 Fed. 702 (1887); Durland v. U. S., 161 U. S. 306 (1895); U. S. v. McAnulty, 187 U. S. 94 (1902), and may, in fact, have been utterly ineffective. Durland v. U. S., *supra*.

But in all there must be the underlying intent. U. S. v. McAnulty, *supra;* Wilson v. U. S. 190 Fed. 427 (1911). The "schemes" which have been punished have smacked of confidence games. Wilson v. U. S., *supra;* Foster v. U. S. 178 Fed. 165 (1910).

PROPERTY—ADJOINING LAND OWNERS—LIGHT AND VENTILATION—An owner of real property, the rear of which abuts on land on which a tenement house is constructed, has no property right in the adjoining owner's compliance with a statute requiring the leaving of a vacant space or yard in the rear of tenement building. Rudnick v. Murphy, 100 N. E. Rep. 643 (Mass., 1913).

In England a land-owner may acquire an easement of light and air by the maintenance of windows over a vacant lot or open space, for twenty years. Toplig v. Jones, 34 L. J. C. P. 342 (Eng., 1865); Chastey v. Ackland (1895), 2 Ch. 389 (Eng., 1895); Stokoe v. Hew Snigers, 8 E. & B. 31 (Eng., 1857). In America, the doctrine that ancient lights may be acquired by prescription has not generally been adopted, although an easement of light and air can be created by express grant. Jesse French Piano and Organ Co. v. Forbes, 129 Ala. 471 (1900); Haverstick v. Sipe, 33 Pa. 368 (1859); Kotz v. I. C. R. R. Co., 188 Ill. 578 (1901). It was held that such a right can be acquired in Clawson v. Primrose, 6 Del. Ch. 643 (1873). Where a grantor of lands has two adjoining lots and grants one with a house containing windows facing the other lot the grantee has a right to the use of such windows without interruption by the grantor or his grantees. Palmer v. Fletcher, 1 Lev. 123 (Eng., 1663); Rosewell v. Pryor, 6 Mod. 116 (Eng., 1602). The general rule in America on this point is that there must be an express covenant. Rennyson's Appeal, 94 Pa. 147 (1880); Doyle v. Lord, 64 N. Y. 432 (1876); Christ Church v. Lavezello, 156 Mass. 89 (1892). Where such light and air is necessary for reasonable enjoyment of the premises the grantee has a right to such an easement but he has no such right where it would be merely a matter of convenience. Rennyson's Appeal, *supra*. Greer v. Van Meter, 54 N. J. Eq. 270 (1896); Turner v. Thompson, 58 Ga. 268 (1877). It would seem from the principal case that a statute such as the one in that case does not create a right of light and air where there was none at common law. Haggerty v. McGovern, 187 Mass. 479 (1905).

PROPERTY—JOINT TENANCY—WORK NECESSARY TO CREATE—In Overheiser v. Lackey, 100 N. E. 738 (N. Y., 1913), a testator had left property "to my daughters, Eliza Jane Marsh and Hester Marsh, jointly." On the death of one of the daughters the question arose whether or not the other took by survivorship. The court held that this devise did not create a joint tenancy. The use of the word "jointly" was not controlling, in view of the fact that the will was not drawn by a lawyer, and of the evident inaccurate and loose use of other legal terms, coupled with the fact that the legislature had declared against joint tenancies unless they were expressly stated to be such.

Joint tenancy, though a favored estate at the common law, Co. Litt. 182a, has been regarded by the modern courts as productive of injustice, and they have, where possible, construed against joint tenancy. 2 Jarm. Wills 1123; Whittlesey v. Fuller, 11 Conn, 340 (1836); Davis v. Smith, 4 Harrington 68 (Del., 1836).

There are in almost every jurisdiction statutes providing that a joint tenancy shall not be deemed created unless plainly apparent or expressly declared. Freeman, Cotenancy, 2d ed. § 35. But a conveyance under such a statute to two persons jointly was held a joint tenancy in Case v. Owen, 139 Ind. 22 (1894); *contra*, Davis v. Smith, *supra*. A devise to several persons and the survivors of them is a clearer case. Apgar v. Christophers, 33 Fed. 201 (1887); Davis v. Smith, *supra*.

In some states the legislature has converted all joint tenancies into tenancies in common. 1 Stim Am. St. L. § 1371 (*a*); Lowe v. Brooks, 23 Ga. 325 (1857).

Other jurisdictions have simply abolished the incident of survivorship. Freeman, Cotenancy, 2d ed., § 35; Bambaugh v. Bambaugh, 11 S. & R. 193 (Pa., 1824).

Joint tenancy is generally upheld, by statute and decision, in the cases of gifts to trustees, in which cases survivorship is to be desired. Parsons v. Boyd, 20 Ala. 112 (1857); Webster v. Vandeventer, 6 Gray 428 (Mass., 1856); R. R. v. Navigation Co., 36 Pa. 204 (1860); Saunders v. Schmaelzle, 49 Cal. 59 (1874).

It is still possible, in the face of the statutes to create joint tenancies, by expressing such an intent in the clearest language. Stimpson v. Batteman, 5 Cush. 155 (Mass., 1849); Arnold v. Jack's Exrs., 24 Pa., 57 (1854).

In many states statutes provide for a joint tenancy as to homesteads. Freeman, Cotenancy, 2d ed., § 47.

PUBLIC SERVICE COMMISSION—POWERS, AND CONSTRUCTION OF NEW YORK ACT—Under the New York Public Service Commission Act, Laws of N. Y. (1907), p. 930, in construing § 68, which reads briefly as follows: "No gas corporation or electrical corporation . . . . shall begin construction, or exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, without first having obtained the permission and approval of the proper commission," it was held that the consent and approval of the commission must be obtained for the construction of a new plant by a corporation in existence at time of the adoption of the act. The effect of the decision is that the clause relating to construction is not qualified by the subsequent clause relating to franchises, "hereafter granted or heretofore granted but not actually exercised," so that any new construction, even though it be a further use of an old franchise which had been exercised before the enactment of this statute, required the approval of the commission. By this interpretation, § 68 was given the same effect as § 53, referring to railroads and similar corporations, which was so worded as to permit of no other construction than this. By amendment passed after this action was instituted, § 68 was made to read similarly to § 53 (Cons. Laws, 1910, § 48, § 68). After reaching the above conclusion the court held that no bond, would be issued under § 69 for the construction unless the latter had been previously approved under § 68.

In Maryland there is an act quite similar in this respect to the New York Act, Bagby; Annotated Code, 1911, title, corporations, § 447, 448) and it would probably be open to the same construction.

It was also held in the principal case that a rival company was an "aggrieved party" within the meaning of the New York Code, and that it could intervene in the proceedings before the commission and would have the right to appeal. The decision in this respect appears to be in accord with People v. Public Service Commission, 195 N. Y. 157 (1909), but Cullen, C. J., gave a very lengthy dissenting opinion on the theory that this adjudication by the Public Service Commission would not be binding as to the relator, the rival corporation, and that the necessity of defendant's franchise could be determined by a separate action between the two corporations.

REAL ESTATE BROKERS—COMMISSIONS ON UNCOMPLETED SALES—A broker employed to sell a property produced a purchaser with whom the owner of the property entered into a valid contract. Although the sale was never completed by the purchaser, it was held that the broker was entitled to his commission for, in securing a person whom the owner, by entering into the agreement of sale, accepted as satisfactory, he had done all that he was required to do. Payner v. Ponder, 77 S. E. Rep. 32 (Ga., 1913).

In the absence of controlling terms in the contract of employment, the general rule is that a broker becomes entitled to his commissions when he has produced to his principal a purchaser who is ready, able, and willing to purchase upon the terms prescribed in the contract between the principal and broker. Blougher v. Clark, 81 Kan. 250 (1909); Watkins v. Thomas, 141 Mo. App. 263 (1909); Clendenen v. Pancoast, 75 Pa. 213 (1874); Reed's Exs. v. Reed, 82 Pa. 420 (1876); Middleton v. Thompson, 163 Pa. 112 (1894). Some cases hold that the principal and purchaser must enter into an enforceable contract

before the broker is entitled. Boyd v. Improved Prop. Co., 135 N. Y. App. 623 (1909); Pfanz v. Humburg, 82 Ohio 1 (1910); Keys v. Johnson, 68 Pa. 42 (1871); Enyeart v. Figard, 38 Pa. Super. Ct. 488 (1909). But if a valid agreement of sale is entered into, the broker's right is not affected by the subsequent failure of the principal to perform. Cohen v. Ames, 205 Mass. 186 (1910); Herrick v. Woodson, 143 Mo. App. 258 (1910); Veeder v. Seaton, 85 N. Y. App. 191 (1903); Freilich v. Tucker, 68 N. Y. Misc. 318 (1910); DeWolf v. Ice Co., 141 Wis. 239 (1910); or by subsequent refusal of purchaser to take title because of defect in principal's title, Tackett v. Powley, 130 Ill. App. 97 (1906); King v. Knowles, 122 N. Y. App. 414 (1907); Arnold v. Nat. Bk., 126 Wis. 362 (1905), unless the broker had notice or knowledge, Corbin v. Bk., 121 N. Y. App. 744 (1907); Montgomery v. Awoler, 57 Tex. Civ. App. 216 (1909); or by purchaser's refusal to take because of principal's misrepresentations, Dotsen v. Milliken, 209 U. S. 237 (1907); Hannan v. Moran, 71 Mich. 261 (1888). And the weight of authority is with the leading case in that if, after a valid contract has been entered into, the sale fail because of the financial inability of the purchaser, the broker is nevertheless, in the absence of fraud, entitled to his commissions. Moore v. Irvin, 89 Ark. 289 (1909); Shainwald v. Cady, 92 Cal. 83 (1891); Alt v. Doscher, 186 N. Y. 566 (1906); Coles v. Meade, 5 Pa. Super. Ct. 334 (1897); *contra*, Beale v. Bond, 84 L. T. N. S. 313 (Eng., 1901); Riggs v. Turnbull, 105 Md. 135 (1907); Butler v. Baker, 17 R. I. 582 (1891).

SALES—RESCISSION FOR FRAUD—In White Sewing Machine Co. v. Bullock, 76 S. E. Rep. 634 (N. C., 1912), the plaintiff's agent represented to the defendant that a local competitor selling plaintiff's machines had discontinued the sale thereof. Defendant, induced by these statements, purchased a large number of machines for that locality. He later learned, however, that the statement had been false as his competitor had recently purchased a large order. It was *held* that such misrepresentation constituted fraud and not mere puffing or promissory representations, and therefore defendant might rescind the contract.

In contracts of sale disclosure is not ordinarily incumbent on the seller, the rule being *caveat emptor*, and the mere failure to disclose material facts does not of itself constitute fraud. Farrell v. Manhattan Co., 198 Mass. 271 (1908); Kentzing v. McElrath, 5 Pa. 467 (1846). But a literal speaking of the truth, if intended to accomplish a fraud, may be as fraudulent as a falsehood. Buford v. Caldwell, 3 Mo. 477 (1834).

"The essential elements of fraud are intention, deception, materiality, reliance, loss." Burdick's Elements of Sales, 106. The false representation is material if the fact untruly asserted or wrongfully suppressed, if it had been known to the party, would have influenced his judgment or decision in making the contract at all. McAleer v. Horsey, 35 Md. 439 (1871); Fishblate v. Fidelity Co., 140 N. C. 589 (1906). To protect himself, the buyer must require the seller to give a warranty of any matter the risk of which he is unwilling to assume. Morrison v. Koch, 32 Wis. 254 (1873).

Fraud renders the sale voidable. Hewitt v. Clark, 91 Ill. 605 (1879); but the contract must be avoided, if at all, within a reasonable time. Boles v. Merrill, 173 Mass. 491 (1899).

SALES—TRANSFER OF TITLE—Although both vendor and vendee treated a contract for the sale of a large quantity of damaged meal as vesting title in vendee, nevertheless, as it appeared that vendor never had that quantity on hand or any quantity set aside for vendee, but only a large quantity of grain from which in process of manufacture the meal would have been produced, it was held that no title in any undelivered meal had passed. Chandler Grain Co. v. Shea, 100 N. E. Rep. 663 (Mass., 1913).

The doctrine is universal and well settled that a vendor can pass no title to goods not in being at the time of the sale, Langton v. Higgins, 4 H. & N. 402 (Eng., 1859); Schreiber v. Butler, 84 Ind. 576, 583 (1882); Robinson v. Stricklin, 73 Neb. 242 (1905); Wilson v. Empire Salt Co., 50 N. Y. App. 114 (1900), *semble;* Sharpsville Furnace Co. v. Snyder, 223 Pa. 372 (1909), except in cases of potential possession. Hull v. Hull, 48 Conn. 250 (1880), young of animals; Van.

Hoozer v. Cory, 34 Barb. 9 (N. Y., 1860), product of animals; Briggs v. U. S., 143 U. S. 346 (1891); Hills v. Edmund Co., 110 Pac. Rep. 1088 (Cal., 1910); Farmer's Bk. v. Coyner, 44 Ind. App. 335 (1909), crops; Manly v. Betzer, 91 Ky. 596 (1891), wages under existing contract; but *cf.* Rochester Co. v. Rosey, 142 N. Y. 570 (1894); Merch. Bk. v. Lovejoy, 84 Wis. 601 (1893). A contract for the sale of future goods is purely executory. Bates v. Smith, 83 Mich. 347 (1890). No title passes until, after the goods have come into existence, the seller appropriates them in completion of the contract, *i. e.* in accordance with the prior directions of vendee. Stewart v. Henningsen Produce Co., 129 Pac. Rep. 180 (Kan., 1913); The Elgee Cotton Cases, 22 Wall. 180 (1874); Heiser v. Mears, 120 N. C. 443 (1897); West Jersey R. Co. v. Car Works Co., 32 N. J. L. 517 (1866); Sempel v. Lumber Co., 142 Iowa 586 (1909); Henderson v. Jennings, 228 Pa. 188 (1910); Am. Hide Co. v. Chalkley, 101 Va. 458 (1903); or, as in the most common case, until delivery. Cobb, Bates & Yerpa Co. v. Hills, 208 Mass. 270 (1911); Dentzel v. Park Assoc., 229 Pa. 403 (1911).

SALES—WARRANTY—INTENT—The defendants had underwritten a large number of shares in a rubber and produce company. The plaintiff asked the defendants whether they were bringing out a rubber company and received an affirmative reply. He then asked whether the company was all right. To this the defendants replied, "We are bringing it out" and plaintiff rejoined, "That is good enough for me." The plaintiff bought the shares which fell in value. The suit was for breach of warranty, the alleged warranty being that the company was a rubber company. The jury found that the company was not a rubber company and the defendant had given the warranty. Held: The question of warranty was improperly left to the jury as there was no evidence to be submitted. The circumstance that the vendee assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention, *is not conclusive.* Heilbert, Symons & Co. v. Buckleton, L. R. 1913 A. C. 11 (Eng.).

Lord Atkinson affirms the dictum of Buller, J., in Pasley v. Freeman, 3 T. R. 51 (1789), where he said: "It was rightly held by Holt, C. J., in Crosse v. Gardner (Conn. 90, 1689) and Medina v. Stoughton (1 Salk. 210, 1699) and has uniformly been adopted ever since, that an affirmation at the time of the sale is a warranty, provided it appears on evidence *to have been so intended.*" Although the cases cited by Buller, J., will not bear him out, nevertheless this has become the law of England. Carter v. Crick, 4 H. & N. 412 (1859), Stuckley v. Baily, 1 H. & C. 405 (1862), and the principal case.

In America the weight of authority is *contra* to the English rule. Stroud v. Pierce, 6 Allen 413 (Mass., 1863). "The intent of the party is immaterial;' Shippen v. Bowen, 122 U. S. 575 (1887); McClintock v. Emick, 87 Ky. 160 (1888); Fairbanks v. Metzgar, 118 N. Y. 260 (1890); Ingraham v. R. R., 19 R. I. 356 (1896). Yet in Pennsylvania the English rule of intent is adopted due to the decision of Gibson, C. J., in Borreckin v. Bevan, 3 Rawle 23 (1831); and affirmed in Pyott v. Baltz, 38 Pa. Sup. Ct. 613 (1909).

The court, per Lord Moulton, overrules the *dictum* in Cane v. Coleman, 3 Man. Ry. 2 (1828) and DeLassalle v. Guildford, 2 K. B. 215 (1901). In the latter case, A. L. Smith, M. R., said the decisive test of intention was "whether the vendor assumes to assert a fact of which the buyer is ignorant or merely states an opinion or judgment of which the vendor has no special knowledge and on which the buyer may be expected also to have no opinion and to exercise his judgment." Lord Moulton said that this was not the "decisive test" because it disregards the material element of *intention* of the parties as to whether the affirmation was to be part of the contract. Williston "Sales," p. 253 (1909 Ed.) cites De Lassalle v. Guildford, for the point that "little stress seems to have been laid on the requirement of intent," but as this has been overruled in the principal case, it cannot be taken as authority.

TENDER—WHAT CONSTITUTES—Tender is an unconditional offer of a debtor to the creditor of the amount of his debt. It is the real amount of the debt as fixed by the law, the purpose being to enable the debtor to relieve himself of interest and costs, and to relieve his property of incumbrance by offering his creditors all that he has any right to claim. It does not mean that the debtor

must offer an amount beyond reasonable dispute, but the amount actually due. Kelley v. Clark, 129 Pac. 921 (Idaho, 1913).

It is an offer to pay a debt or to perform a duty. 9 Bacon Abr. At the common law, wherever there is a debt or duty due and the thing due is either certain, or capable of being made so by mere computation, a tender of the debt or duty may be made; Solomon v. Bewicke, 2 Taunt. 317 (1810); Green v. Shurtliff, 19 Vt. 592 (1847). But at the common law a tender is not allowed where the amount of the compensation is unliquidated, whether the right to the compensation is based upon a breach of a contract, or is one arising out of a tort. Lawrence v. Gifford, 17 Pick. 366 (Mass., 1835); Gregory v. Wells, 62 Ill. 232 (1871); Davys v. Richardson, 21 Q. B. D. 202 (1888). This has been changed by statute in many jurisdictions. Viall v. Carpenter; 16 Gray 285 (Mass., 1860); Frantz v. Rose, 89 Ill. 590 (1878).

Nothing short of an offer of everything that the creditor is entitled to receive is sufficient, and a debtor must at his peril tender the entire sum due. Coleman v. Ross, 46 Pa. 180 (1863); Graham v. Linden, 50 N. Y. 547 (1872); Cheney v. Roodhouse, 135 Ill. 257 (1890); Kingsley v. Anderson, 103 Minn. 510 (1908). The debtor must do and offer everything that is necessary on his part to complete the transaction, and must fairly make known his purpose without ambiguity. Lilienthal v. McCormick, 117 Fed. 89 (1902).

The thing to be tendered must be actually produced and offered to the party entitled thereto, a mere offer to pay being insufficient. 34 Ala. 126 (1859); Chase v. Welsh, 45 Mich. 345 (1880); Deering Harvester Co. v. Hamilton, 80 Minn. 162 (1900). The tender must be unconditional. Coghlan v. S. C. R. Co., 32 Fed. 316 (1887); Cornell v. Huyden, 114 N. Y. 271 (1889); Mann v. Roberts, 126 Wis. 142 (1905).

TORTS—MALICIOUS PROSECUTION—PROBABLE CAUSE—Information received from apparently respectable persons and believed to be credible, as to the commission of an offense, is sufficient evidence of probable cause for prosecution against the offender. Louisville & N. R. Co. v. Stephenson, 60 So. Rep. 490 (Ala., 1912).

In malicious prosecution, absence of probable cause is an essential element to plaintiff's case, Devain v. Descabo, 66 Cal. 415 (1885); and it is therefore full justification that the defendant had good reasons for taking proceedings. White hurst v. Ward, 12 Ala. 264 (1847). To constitute probable cause the defendant must have had a real and honest belief based upon such facts and circumstances as would have aroused a reasonable suspicion of guilt in a prudent person. Hitson v. Sim, 69 Ark. 439 (1901); McClafferty v. Philip, 151 Pa. 86 (1892). The facts upon which the defendant relied may be those within his personal knowledge or those which he learns from proper information derived from statements of others. Shafer v. Hertzog, 92 Minn. 171 (1904); French v. Smith, 4 Vt. 363 (1832); but such information must come from credible sources. Devain v. Descalo, 66 Cal. 415 (1885); Smith v. Ege, 52 Pa. 419 (1865).

As a general rule it is a good defense to an allegation of want of probable cause to show that the defendant acted under the advice of counsel after having placed the facts before him. Donnelly v. Dagget, 145 Mass. 314 (1887); Neufield v. Rodeminskir, 144 Ill. 83 (1893); Walter v. Sample, 25 Pa. 275 (1855). The advice must be that of a practising attorney, Stanton v. Hart, 27 Mich. 539 (1873). The advice must have been honestly sought, Ames v. Snider, 69 Ill. 376 (1873); and defendant must show he stated all the facts fully and fairly without exaggeration and without witholding any. Stevens v. Fassett, 27 Me. 266 (1847); Flora v. Russell, 138 Ind. 153 (1894); and that he resorted to advice of counse lin good faith, Fisher v. Forrester, 33 Pa. 501 (1859). Discharge of plaintiff by magistrate is *prima facie* evidence of want of probable cause, but not conclusive, Barbight v. Tamany, 158 Pa. 545 (1893). Want of probable cause can never be implied from malice. Stewart v. Sonneborn, 98 U. S. 187 (1878); McCasland v. Kniberlin, 100 Ind. 121 (1884). Want of probable cause means want only at time of commencement of the proceedings, Fox v. Smith, 25 R. I. 255 (1903). The same principles determine the question as to want of probable cause where defendant has instituted civil proceedings as in criminal proceedings. Nicholson v. Coghill, 4 B. & C. 21 (Eng., 1824); Stewart v. Sonneborn

supra. Probable cause in England is a matter of law for the court while in America a matter of mixed law and fact. Leahy v. March, 155 Pa. 458 (1893); Besson v. South- ard, 10 N. Y. 236 (1851).

TORTS—RELEASE OF ONE JOINT TORT-FEASOR—A release of one joint tort-feasor, unless expressly reserving the right to pursue the others, releases all, even though the one claimed by the injured party to be liable, and who was released for a consideration, was in fact not liable. Casey v. Auburn Telephone Co., 139 N. Y. Suppl. 579 (1913).

The majority of the decisions on the subject support the principal case, holding with it that the party injured, by accepting satisfaction from another, is estopped from saying that he had no claim against him, and therefore, it is wholly immaterial from whom such satisfaction is received. Tompkins v. Clay Street R. R. Co., 66 Cal. 163 (1884); Miller v. Back, 108 Ia. 575 (1899); Leddy v. Barney, 139 Mass. 394 (1885); Hartigan v. Dickson, 81 Minn. 284 (1900); Leither v. P. R. T. Co., 125 Pa. 397 (1889). A mere gift or gratuity from one against whom no claim is asserted will not, however, operate as a satisfaction so as to release the person who caused the injury. Sieber v. Amundsen, 78 Wis. 679 (1891).

In those jurisdictions holding *contra* to Casey v. Telephone Co., *supra*, it is argued that any consideration received from one not actually liable cannot operate by way of estoppel inasmuch as the party not released is no party or privy to the arrangement, and, therefore, such consideration ought not to be regarded as a satisfaction. Western Tube Co. v. Zang, 85 Ill. App. 63 (1899); Kentucky Bridge Co. v. Hall, 125 Ind. 220 (1890); Wardell v. McConnell, 25 Neb. 558 (1889).

TORTS—"SHADOWING" A PERSON—LIABILITY—The plaintiff who had been a witness against the defendant company, was kept under constant and continued surveillance by defendant's detectives, who employed open or "rough shadowing." Among other things plaintiff showed that he had been dismissed from his employment by reason of defendant's acts. Held, that open or "rough shadowing" of a citizen by private detectives so as publicly to proclaim him a suspect who deserves watching, is actionable as defamation. Schultz v. Frankfort Ins. Co., 139 N. W. Rep. 386 (Wis., 1913).

This is an extension of the law of defamation as ordinarily recognized. In general, defamation is said to consist of a defamatory statement which, when oral, constitutes slander, and, when written, libel. Salmond, Torts (3d Ed.), 406. Slander, in general, is perceptible only by the ear; and libel, only by the eye. But a defamatory communication made by means of finger-signs is slander, not libel. Frazer, Libel and Slander, (4th Ed.) 3.

Various forms of libel other than written or printed statements have, however, been recognized. So, dishonoring plaintiff's checks by a banker who has sufficient funds in hand belonging to plaintiff. Rolin v. Stewart, 23 L. J. C. P. 148 (1854); putting a lantern, the well-known sign of a bawdy-house, before plaintiff's door, Jefferies v. Duncombe, 11 East 226 (Eng., 1809); fixing gallows against plaintiff's door, Hawkins, Pleas of Crown (8th Ed.), I, 542; giving plaintiff's tavern the repute of a bawdy house by bringing whores or men dressed as whores thereto, Plumket v. Gilmore, Fortescue 211 (1724); placing a wax figure of plaintiff among those of notorious felons, Monson v. Tussand, L. R. (1894) 1 Q. B. 671; burning or hanging plaintiff in effigy, Eyre v. Garlick, 42 J. P. 68 (Eng., 1878); Johnson v. Comm., 14 Atl. 425 (Pa., 1888); exhibiting a picture of one in a disgraceful position. DuBost v. Beresford, 2 Campb. 511 (1810). See 5 Co. 126 (1606). Perhaps the cases nearest to the facts of the principal case are those of "riding Skimmington" which was a mode of ridiculing a henpecked husband. Rex v. Roberts, 3 Keble 578 (1674); Cropp v. Tilney, 3 Salk. 225 (1694). In an unreported case from Lower Canada, cited in Townshend, Libel and Slander (4th Ed.), 2, note, one who took up the collection in a church, for the purpose of humiliating plaintiff, passed him by without giving him an opportunity to contribute. And it was held that the defendant was liable as he was bound to perform his services, though gratitutious, without subjecting anyone to ridicule.